

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARILYN GREEN,

07-CV-0023

v.

ORDER

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

This action was initially brought pursuant to 42 U.S.C. § 405(g) to review the final decision of the Commissioner of Social Security (the "Commissioner") which denied plaintiff's claim for Disability Insurance Benefits and Supplemental Security Income payments pursuant to Title XVI of the Social Security Act. Thereafter, both parties moved for judgment on the pleadings. The parties' motions were referred to Magistrate Judge Jeremiah J. McCarthy for consideration of the factual and legal issues presented, and to prepare and file a Report and Recommendation containing a recommended disposition of the issues raised.

By Report and Recommendation dated December 8, 2008, Magistrate Judge McCarthy found that the Commissioner's determination denying plaintiff's application for benefits was not supported by substantial evidence, and recommended that the case be remanded for further administrative proceedings in accordance with his findings. Although the parties were advised of their right to file objections to Judge McCarthy's Report and Recommendation, the

potential consequences of failing to file objections, and the deadline for filing such objections, neither party has filed any objection to Judge McCarthy's Report.

Because neither party has filed an objection to the December 8, 2008 Report and Recommendation, the parties have waived their rights to de novo review pursuant to 28 U.S.C. § 636(b)(1). See Caidor v. Onondaga County, 517 F.3d 601, 604 (2d Cir.2008); U.S. v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). In addition, the Second Circuit has by rule adopted the position that where the parties have received notice of the consequences of failing to object to a Magistrate Judge's Report and Recommendation, such a failure will preclude any further review of a Decision adopting a Magistrate Judge's Report and Recommendation. See Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir.1989) ("failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision"); see also Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir.1988).

I find that Magistrate Judge McCarthy's recommendation that the matter should be remanded to the Commissioner is supported by the record. Moreover, because there is no clear error in Magistrate Judge McCarthy's Report and Recommendation, I adopt his December 8, 2008 Report and Recommendation in its entirety, and Order that the defendant's motion for judgment on the pleadings is

denied; plaintiff's motion for judgment on the pleadings is granted; and this case be remanded to the Commissioner for further administrative proceedings.

ALL OF THE ABOVE IS SO ORDERED.

s/Michael A. Telesca
Michael A. Telesca
United States District Judge

DATED: Rochester, New York
January 6, 2009